THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 05-11873
	)	
STEVEN H. KERR,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
SHOWE MANAGEMENT CORPORATION, dba LAKESHORE TOWERS,	)	Adversary Proceeding No. 06-1298
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
STEVEN H. KERR,	)	**MEMORANDUM OF OPINION**
	)	
Defendant.	)	

The defendant-debtor Steven Kerr moves to dismiss this complaint to determine the dischargeability of a debt on the ground that the plaintiff Showe Management Corporation did not timely file it.[1] Showe opposes the motion and, if the complaint is found to be untimely, moves to amend the complaint to bring it within the timing requirements.[2] For the reasons stated below, the debtor's motion is denied and Showe's motion is moot based on that ruling.

[1] Docket 9, 15.

[2] Docket 11, 13.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

ISSUE

Is a complaint challenging dischargeability of a debt timely filed when it is filed within 60 days of the § 341 meeting in the main bankruptcy case, rather than as a separate adversary proceeding?

FACTS

The debtor filed a chapter 13 case on February 17, 2005.[3] By order dated November 8, 2005, he converted his case to one under chapter 7. The court set March 27, 2006 as the last day for creditors to oppose the debtor's discharge or to determine the dischargeability of a debt.

On March 27, 2006, creditor Showe Management Corporation filed in the main bankruptcy case a document titled "Complaint Objecting to the Discharge of Debtor and/or Dischargeability of Certain Debts" supported by two exhibits. The exhibits are a magistrate's report and a judgment in a case filed by Showe against Mr. Kerr in the Lakewood Municipal Court. The December 16, 2004 Report of the Lakewood Municipal Court Magistrate to the Lakewood Municipal Court Judge makes findings of fact and conclusions of law. Specifically, the report finds that Mr. Kerr breached his residential lease agreement with Showe and that Showe established damages from that breach, including the cost of replacing kitchen cabinets,

[3] The debtor filed his case before the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act. All references in this opinion, therefore, are to the version of the bankruptcy code and rules in effect when the case was filed.

doors, slides, screens, windows, range, refrigerator, dishwasher, all doors, and shower rods; repairing all outlets and repairing and replacing hallway lights and wiring; changing the locks; and replacing entry, garage, and mailbox keys. The magistrate also found that Mr. Kerr "intentionally cut wires and placed expanding insulating foam in electrical outlets throughout the apartment." The magistrate recommended judgment for Showe in the amount of $13,990.55 plus interest and court costs. In a January 3, 2005 judgment, the judge adopted the magistrate's findings of fact and conclusions of law and ordered judgment for Showe and against Mr. Kerr in the amount of $13,990.55 plus interest and costs.

Because Showe filed the complaint in the main case, the clerk's office followed standard procedure and issued a deficiency notice advising Showe that it had to open an adversary proceeding.[4] Showe did so on March 29, 2006 by filing the same documents filed in the main case on March 27, 2006 and paying the filing fee.

DISCUSSION

11 U.S.C. § 523

A creditor must affirmatively request a determination of dischargeability of certain debts under § 523.[5] Without such action, the debt is automatically discharged. *See* 11 U.S.C. § 523(c)(1). A proceeding to determine the dischargeability of a debt is classified as an adversary proceeding and an adversary proceeding is commenced by the filing of a complaint. *See* FED. R. BANKR. P. 7001(6) and FED. R. BANKR. P. 7003 (incorporating FED. R. CIV. P. 3).

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[4] *See* docket entries 109, 110, 111, and entry for 3/28/06.

[5] Based on the factual allegations stated in the complaint, it appears that Showe is requesting a determination of dischargeability under 11 U.S.C. § 523(a)(6).

See also FED. R. BANKR. P. 4007(e) (providing that a complaint to determine dischargeability is "governed by Part VII of the rules."). A dischargeability complaint "shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)." FED. R. BANKR. P. 4007(c). The court may extend that time for cause on motion filed before the time has elapsed. *Id*.

The Defendant-Debtor's Motion to Dismiss

I.

The debtor argues that Showe's March 27, 2006 filing of a complaint in the main case was ineffective to commence an adversary proceeding and that the March 29, 2006 opening of an adversary was untimely. He argues further that because the creditor did not request an extension of the 60 days before that time expired, the court may not now extend it. Showe contends in opposition that his March 27th filing gave the debtor adequate notice of its objection based on the Lakewood Municipal Court judgment. The debtor responds that the court docket for March 27th reads "corrective action required-document invalid," which conclusively establishes that the filing made on that date was insufficient.

II.

A creditor can only meet the 60-day deadline for objecting to the dischargeability of a debt by filing a complaint or requesting additional time in which to do so before the time expires. The question here is: where does the complaint have to be filed? Showe filed a complaint in the main bankruptcy case within the 60-day time frame; the complaint notified the debtor and all parties in interest that Showe objected to the dischargeability of the debt owed to it by the debtor based on the facts found by the Lakewood Municipal Court. The debtor does not challenge the

sufficiency of the complaint. Instead, he argues that a creditor can only meet the 60-day requirement by opening an adversary proceeding and filing a complaint in it. He does not, however, cite any cases that support this legal proposition. Instead, the cases cited deal for the most part with situations where the creditor did not file a complaint within the required time, did not timely move to extend the time to file a complaint, and then asked the court to permit a late filing. Under those circumstances, most courts do not permit the late filing. *See, for example, Ohio Farmers Insur. Co. v. Leet (In re Leet)*, 274 B.R. 695 (B.A.P. 6th Cir. 2002) (absent a court error or a timely filed motion to extend the time, court lacked power to permit a party to file a § 523 complaint two days after the 60-day deadline expired).

The situation here, however, is closer to the one considered by the Sixth Circuit Court of Appeals in *New Boston Dev. Co. v. Toler (In re Toler)*, 999 F.2d 140 (6th Cir. 1993). In *Toler*, decided in the days before electronic case filing, the clerk's office timely received and file-stamped a dischargeability complaint, but then returned it to creditor's counsel because counsel had not complied with a local rule requiring a complaint to be accompanied by a summons. Counsel resubmitted the complaint and summons beyond the 60 days and the debtor moved to dismiss. The bankruptcy court granted the motion and the creditor appealed.

On appeal, the Sixth Circuit considered when the complaint had been "filed" within the meaning of bankruptcy rule 4007(c). The Circuit looked for guidance to bankruptcy rule 7005 as amended effective December 1, 1991, although that amendment did not apply directly to the case at hand. The rule as amended provided "[t]he clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices." FED. R. CIV. P. 5(e) (made applicable by FED. R. BANKR. P.

7005). Applying the philosophy reflected in that rule, the Circuit found the complaint timely, holding that "filing takes place when the documents are tendered to the court clerk, local rules notwithstanding." *Id.* at 142. Stated somewhat differently, "the term 'filed' for the purpose of filing complaints, 'means that the pleadings 'are placed in the possession of the Clerk of the Court'." *Stipancich v. Colston (In re Colston)*, 244 B.R. 770 (Bankr. S.D. Ohio 2000) (quoting *Maroski v. Futrell (In re Futrell)*, 69 B.R. 378, 381 (Bankr. W.D. La. 1987). As the *Toler* court noted, "[m]istakes or errors can be corrected after the document has been filed[], including failure to pay the filing fee." *In re Toler,* 999 F.2d at 142.

In this case, the creditor failed to comply with the prescribed procedures for filing an adversary proceeding rather than with a local rule. Nevertheless, the *Toler* discussion makes it clear that the analysis should be the same. Under federal bankruptcy rule 7005, the clerk could not have refused to accept Showe's complaint as offered (electronically) even though it did not comply with the rules for adversary proceedings. Since the clerk had to–and did–accept the document for filing on March 27, 2006, the court concludes that Showe filed its complaint within the 60 days as required by federal rule of bankruptcy procedure 4007(c). *See First Fin. Bank, NA v. Forsythe (In re Forsythe)*, 2005 WL 4041162 (Bankr. S.D. Ohio 2005) (where creditor filed a § 523 complaint in the main case and incorrectly docketed it as a "Submission of Summons for Court Issuance," the court nevertheless found it was timely filed under rule 4007(c)).

The debtor argues that the clerk's office electronic notation on the docket conclusively shows that the result must be otherwise. The entry says: "Corrective action required-document invalid and incomplete." The debtor's position that this proves the filing is *substantively* invalid is misguided because the clerk's office does not make legal decisions, the court does. *See*

Edwards v. Whitfield (In re Whitfield), 41 B.R. 734, 736 (Bankr. W.D. Ark. 1984) ("It is for this Court and not the clerk . . . to determine the legal sufficiency of documents tendered for filing."). The clerk here did exactly what he should have done; he determined that the complaint needed to be refiled and sent a deficiency notice to that effect. The deficiency notice is no more or less than its name implies: *i.e.*, a notice that a filing needs attention. It does not have any independent legal significance.

The debtor also argues that the March 27, 2006 filing did not give him appropriate notice that Showe was challenging the dischargeability of the debt. He says: "As the docket clearly reflects that documents 109 and 110 [are] invalid and improper and corrective action is required, a party has no reason to look further at whatever was mistakenly and improperly and invalidly filed by the creditor."[6] There are two problems with this argument. First, the debtor does not say that *he* did not open up the documents, just that he did not think a party would have to take any action. And second, he does not cite any case to support this proposition. The court finds that the opposite is, in fact, true and that the debtor is on notice of any document filed in his bankruptcy case.

The complaint filed by Showe, while not picture-perfect, gave the debtor adequate notice within the statutory time frame that Showe objected to the dischargeability of its debt. The debtor's motion does not, therefore, state good cause and is denied.

Showe's Motion for Leave to Amend the Complaint *Nunc Pro Tunc*

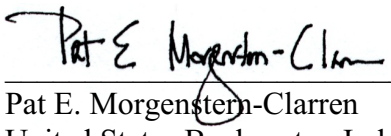
In this counter motion, Showe moves for leave to deem the March 29, 2006 filing to be an amended complaint relating back to the March 27, 2006 filing. The argument in support is

[6] Docket 15 at 9.

that leave to amend should be freely given when justice so requires. The debtor opposes the motion on the ground that Showe is not seeking to amend the complaint because both filings are identical. He also argues that he will be unduly prejudice if the motion is granted because he was able to "breath easy" knowing that no complaint had been timely filed based on the clerk's office docket notation. The court does not need to address this motion in light of the decision that Showe timely filed a complaint.

CONCLUSION

For the reasons stated, the debtor's motion to dismiss is denied and Showe's motion to amend the complaint is deemed to be moot. A separate order will be entered reflecting this decision.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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SHOWE MANAGEMENT CORPORATION, dba LAKESHORE TOWERS,	)	Adversary Proceeding No. 06-1298
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
STEVEN H. KERR,	)	
	)	
Defendant.	)	

For the reasons stated in the memorandum of opinion filed this same date, the debtor's motion to dismiss is denied (docket 9) and Showe Management Co.'s motion to amend the complaint is deemed to be moot (docket 11).

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge